**U.S. Department of Homeland Security**
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Washington, DC 20529

**U.S. Citizenship and Immigration Services**

B4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 16 2004

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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**DISCUSSION**: The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because: (1) no qualifying relationship exists between the petitioner and the claimed foreign entity; (2) the proffered position is not in a managerial or executive capacity; and (3) the petitioner had not been doing business for at least one year at the time it filed the petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

(1) Priority Workers. – - Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. – - An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of Shanghai General Electronics Group Co. Ltd. (Shanghai Electronics) of the People's Republic of China; (2) distributes Shanghai Electronics' products throughout North America; and (3) employs five persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at a salary of $5,500 per month.

The first issue to be discussed is whether a qualifying relationship exists between the petitioner and the foreign entity, Shanghai Electronics. 8 C.F.R. § 204.5(j)(3)(i)(C). When filing the petition, the petitioner claimed that it was a subsidiary of Shanghai Electronics. According to the petitioner, in August 1999, Shanghai

Electronics paid $162,545 to purchase 162,545 shares of its stock. As documentary evidence of the claimed relationship, the petitioner submitted, among other documents, copies of: (1) its Articles of Incorporation; (2) its stock certificate; (3) its stock ledger; and (4) its 2001 corporate tax return (Form 1120).

The evidence submitted did not persuade the director that the two entities shared a parent/subsidiary relationship. Therefore, on March 5, 2002, the director requested that the petitioner submit, among other items, proof that Shanghai Electronics purchased its shares of stock. The petitioner complied with the director's request by submitting copies of two wire transfers: one transfer, dated August 24, 1999, was for $60,000 USD; the other transfer, dated August 25, 1999, was for $200,000 USD. Each transfer indicated that the originator of the funds was Shanghai TV & Electronics Import and Export Co. Ltd. (Shanghai TV), and that the payment of funds was "payment for technical cooperation."

The director denied the petition, in part, due to the lack of a qualifying relationship between the U.S. and Chinese entities. The director discussed the two wire transfers, noting that the originator of the funds was Shanghai TV, not the alleged parent company, Shanghai Electronics. The director also noted that the reason for the transfer of money was "payment for technical cooperation," not for shares of the petitioner's stock. In addition, the director noted that on its 2001 tax return, the petitioner listed $839,784 on Line 22b of its Schedule L.

On appeal, counsel submits copies of documents already included in the record as well as new documents to prove that the petitioner is a subsidiary of Shanghai Electronics. To counter the director's claims that the petitioner is not a subsidiary of Shanghai Electronics, the petitioner submits on appeal a letter from Shanghai Electronics. According to this letter, Shanghai TV is a subsidiary of Shanghai Electronics, and it had the authority to wire $260,000 into the petitioner's bank account to pay for the shares of stock. The petitioner also submits a letter from an attorney [redacted] and a written consent from the board of directors. [redacted] states that although Shanghai Electronics paid for the petitioner's shares of stock seven months after the stock certificate was issued, the issuance of the shares of stock was valid under California Corporate law. The written consent indicates that on January 10, 1999, the board agreed to give Shanghai Electronics additional time to make payment for the stock shares; the consent does not, however, stipulate when the money for the shares was due. Regarding the term "payment for technical cooperation" that was written on each wire transfer, the petitioner submits a letter from [redacted] who is described as a business consultant. According to [redacted] the term "payment for technical cooperation" has a broad meaning and may include money paid for capital investment. [redacted] states further that this term is used in order to wire foreign currency from China. Finally, the petitioner submits a letter from its tax preparer, who states that the information on the Schedule L regarding the common stock was incorrect. The petitioner also submits copies of amended tax returns.

The regulations at 8 C.F.R. § 204.5(j)(2) define a subsidiary, in pertinent part, as a firm, corporation, or other legal entity of which a parent owns directly or indirectly, half of the entity and controls the entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289

(Comm. 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

According to the stock ledger, on January 5, 1999, the petitioner issued stock certificate number one to Shanghai Electronics for 162,545 shares of stock, which cost $162,545. However, both counsel and the petitioner assert that Shanghai Electronics did not remit the $162,545 until August 1999. The petitioner must establish that it received $162,545 from Shanghai Electronics for the specific purpose of purchasing its shares of stock as of the date that the stock certificate was issued. The August 1999 wire transfers establish only that a company, Shanghai TV, not Shanghai Electronics, transferred money into the petitioner's bank account, not that this money was used to purchase shares of the petitioner's common stock.

The AAO does not find persuasive the petitioner's evidence on appeal regarding the wire transfers. First, an attorney name[redacted] asserts, "It is our belief that so long as the stock certificate representing the Shares was not delivered to [Shanghai Electronics] until the Stock Consideration was received by [the petitioner], the issues of the shares to [Shanghai Electronics] is valid and in compliance with California Corporate Law." CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). [redacted] statement about the validity of the share certificate is unsupported by any independent evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In addition, the petitioner did not present any evidence of [redacted] expertise to render his opinion on the issuance of stock certificates. The brief resume of [redacted] that the petitioner supplied indicates only that [redacted] is an attorney and a member of a bar association; it does not establish him as an expert in any field. Accordingly [redacted] opinion carries no weight in these proceedings.

Second, the opinion of [redacted] regarding the term "payment for technical services" also carries little weight for the same reasons that the AAO found [redacted] opinion to be deficient. Even if Ms. Hsia's opinion carried weight, it would have not persuasive value. If, a [redacted] contends, the term "payment for technical

services" could mean any number of things, then the term does not necessarily show that the transfer of money was related to the purchase of the petitioner's shares of stock. The statements of the foreign entity and Shanghai TV, by themselves, are not sufficient substitutes for documentary evidence. *Matter of Treasure Craft of California, supra.*

Third and finally, the written consent from the board of directors does not clarify the inconsistent evidence. The written consent only indicates that the board allowed Shanghai Electronics additional time to remit money for the payment of the shares. The consent does not specify a particular date by which it was to receive the money, and there is no evidence that the petitioner did receive the $162,545 for the shares of stock. Accordingly, the written consent is also of little value.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The documentation in the record does not enable the AAO to favorably determine that the petitioner is a subsidiary of Shanghai Electronics, in that Shanghai Electronics owns and controls this particular U.S. entity. Simply asserting that Shanghai Electronics owns a majority of the petitioner's shares of stock is not enough. The petitioner must establish not only the exact percentage of Shanghai Electronics' ownership interest in the U.S. entity, but also show that it paid for the petitioner's shares of stock when the stock certificates were issued. As the petitioner has failed to establish that it is a subsidiary of Shanghai Electronics, the director's decision to deny the petition, in part on this issue, shall not be disturbed.

The second issue to be discussed in this proceeding is whether the beneficiary's proposed employment with the U.S. entity is in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

When filing the I-140 petition, counsel asserted that the beneficiary would be a "functional manager," and that the majority of the beneficiary's duties would relate to "operational and policy management and to lower level execution of the policies." The director was not satisfied with the initial evidence presented. Therefore, in a March 5, 2002 request for evidence (RFE), the director asked the petitioner to submit evidence relating to the beneficiary's proposed duties, including a description of his actual job responsibilities and an organizational chart that listed all of the company's employees.

In response, the petitioner stated the following about the beneficiary's responsibilities: direct and oversee the company's business (30%); exercise discretion over day-to-day operations (20%); implement company policies (10%); exercise authority over personnel decisions, including the hiring and firing of managers and employees (10%); establish the company's development and expansion plans (10%); execute business transactions and sign contracts (10%); and formulate appropriate course of action (10%). The petitioner also included an organizational chart that listed 12 employees, and provided the job titles and job descriptions of these employees.

The director found that the proffered position is not in a managerial or executive capacity because according to the DE-6 form that covered the period of the petition's filing, the petitioner employed only two sales representatives and two managers in addition to the beneficiary. The director found that the organizational structure could not support a position that is primarily managerial or executive.

On appeal, the petitioner submits an organizational chart, a job description for the beneficiary, and its employees' job descriptions to establish that the beneficiary works in a managerial or executive capacity. Counsel states that the petitioner has rapidly expanded its operations, which include offices in New Jersey and California, and that the beneficiary oversees the entire operations.

The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. As stated previously, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). Here, the job duties that the petitioner has listed for the beneficiary are essentially a recitation of several of the elements of the statutory definitions of managerial and executive capacity. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

There is no clarifying information regarding how the beneficiary directs the company's organization. The assertion that the beneficiary will "formulate appropriate course of action" lacks any specificity or context, and therefore, any real meaning. When filing the petition, counsel maintained that the beneficiary would manage an essential function; however, counsel has never identified the particular function that the beneficiary will manage and how it is essential to the petitioner's operations. Accordingly, the petitioner has not shown that the position offered to the beneficiary is in an executive or managerial capacity, and the director's decision to deny the petition on this basis shall not be disturbed.

The third and final reason for denial was that the petitioner had not been doing business for at least one year at the time it filed the I-140 petition. 8 C.F.R. § 204.5(j)(3)(i)(D). The term *doing business* is defined as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." 8 C.F.R. § 204.5(j)(2).

When filing the petition in February 2002, the petitioner presented evidence regarding its operations including copies of its tax returns, invoices, business documents, and telephone bills. In a March 2002 RFE, the director requested that the petitioner submit, among other items, various tax records. The petitioner complied with the request.

When denying the petition, in part, because the petitioner had not been doing business for at least one year at the time it filed the petition, the director cited the business documents in the file and noted that the petitioner was acting as an agent, and was not regularly, systematically and continuously providing goods and/or services.

On appeal, the petitioner submits additional evidence, including a press release about a business agreement with InFocus Corporation, correspondence about the petitioner's expansion, and evidence that the petitioner is a member of the Consumer Electronics Association (CEA). Counsel states on appeal:

> The U.S. subsidiary . . . is not acting as [an] Agent. Its business activities include international trading, manufacturing, and after-sales services. It has entered [into] a contract with InFocus Corporation to manufacture SVA's DLP-based rear projection TV[s], on October 25, 2001. The New Jersey office was set up for the expansion of the business. The company has already started to manufacture some sample products to export to China. In addition, it has started to establish a service center to modify the television models . . . .

There is no evidence in the record to establish that the petitioner had been engaged in the regular, systematic, and continuous provision of goods and/or services for at least one year when it filed the I-140 petition. Although the petitioner's 2001 income tax returns show that it had gross receipts/sales of $1,246,414, the petitioner did not show the source of this income. The petitioner did not submit documentary evidence to show that this income was derived from regularly, systematically and continuously providing its services; this income could have derived from working on just one large sale during the year.

The AAO notes that on appeal, counsel discusses future plans of the petitioner to open a service center and to manufacture goods. However, a petitioner must establish that it *had been* doing business for one year prior to filing the petition, not that it will do business in the future. A visa petition may not be approved based on speculation of future eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Without documentary evidence that the petitioner had been regularly, systematically and continuously providing goods or services for at least one year prior to the filing of the petition, the AAO will not overturn the director's decision on this issue.

Beyond the director's decision, because the petitioner has not established the existence of a qualifying foreign entity, the beneficiary cannot meet the requirement of 8 C.F.R § 204.5(j)(3)(i)(B), which states that the beneficiary must have been employed by the qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status. Although the director did not discuss this issue in his denial letter, it is another reason why the petition may not be approved. Without a qualifying foreign entity, the beneficiary cannot have the necessary work experience as discussed in the cited regulation.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed. The petition is denied.